80-1548

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980
Docket No.

BRINTON ESTY, DETECTIVE EDWARD MORGAN, ROBERT GARBUS AND SERGEANT LESLIE WILLIAMS,

Petitioners,

-against-

AURORA O'NEAL as Administratrix of Estate of TYRONE O'NEAL, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

In this multi-defendant action brought pursuant to 42 U.S.C.A. §1983, was the Court of Appeals' holding that the telephonic admission offered by plaintiff, which could not be attributed to a single individual defendant, was admissible and "leaving to each defendant the burden of persuading the jury that the admission was not made by him" proper and in accordance with the Federal Rules of Evidence?

Parties

The parties to this action are the same as contained in the caption.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	3
Statement of Facts	3
Reasons for Granting the Writ	12
Conclusion	34
Opinion of the United States Court of Appeals for the Second Circuit	1a
Judgment of the United States District Court for the Eastern District of New York	16a
Order of the United States District Court for the Eastern District of New York	18a

TABLE OF AUTHORITIES

Cases	Page
Lis v. Robert Packer Hospital, 579 F. 2d 819 (3d Cir., 1978), cert. den. ____ U.S. ____, 99 S. Ct. 354 (1978)	30,31, 32
United States v. Drake, 542 F. 2d 1020 (8th Cir., 1976), cert. den. 429 U.S. 1050 (1977)	30
United States v. Ellison, 557 F. 2d 128, (7th Cir., 1977), cert. den. 434 U.S. 964 (1977)	30
United States v. Russo, 540 F. 2d 1152 (1st Cir., 1976), cert. den. 429 U.S. 1000 (1976)	30
Ybarra v. Spangard, 93 Cal. 2d 43, 208 p. 2d 445 (District Court of Appeal, Second Circuit, 1949)	19,24

Statutes and Ordinances

	Page
Federal Rules of Evidence	
Rule 403	3,26
Rule 611	3,16,28 29,30, 31,32
Rule 801	3,15,16 18,26
Rule 901	3,15,28
42 U.S.C. §1983	i,1
N.Y.P.L.	
§140.25	5
§145.00	5
§205.30	5
§220.45	5
28 U.S.C. §1254(1)	3

Other Authorities

	Page
Prosser, The Law of Torts (4th Ed., 1971).....	18,20 22,23 24
Report of Committee on the Judiciary House of Representatives, 93rd Congress, 1st Session, No. 93-650, Nov. 15, 1973, p. 12.....	30
79 ALR 3d 79, Admissibility of Telephone Conversations, §2 (1977)...	14
29 Am Jur 2d, Evidence, §§380, 383 (1967).....	14
Weinstein and Berger, Vol. 3, Weinstein's Evidence, par. §611[2]...	29,30

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

In this action brought pursuant to 42 U.S.C. §1983, the Court of Appeals for the Second Circuit reversed the judgment of the District Court for the Southern District of New York, based on a jury verdict, insofar as it dismissed plaintiff's claims of assault

and deprivation of medical treatment and ordered a new trial.* The Court of Appeals held that the District Court committed reversible error by excluding evidence of a telephonic admission allegedly made by one of the defendants that they had "beat up" Tyrone O'Neal although the purported admission could not be attributed to a single, identifiable defendant.**

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on

*During the trial, at the completion of plaintiff's case, the District Court granted defendants' motion for a directed verdict on the claim of false arrest. The Court of Appeals held that this ruling was correct.

**Tyrone O'Neal's unrelated death occurred prior to the commencement of trial. His wife, the administratrix of his estate, was substituted as plaintiff.

December 23, 1980 and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

Statutory Provisions Involved

This case involves the application of the Federal Rules of Evidence and in particular Rules 801, 901, 403, and 611.

Statement of Facts

At trial, plaintiff's direct case, in large part, was based on two pre-trial depositions of Tyrone O'Neal, then deceased, which were read into the record, outlining the events preceding and subsequent to O'Neal's arrest.

O'Neal testified that he had contacted detectives of the New York City Police Department's Narcotics Division and had offered to obtain information on drug

traffic in the Jamaica, Queens, area of New York City.* In seeking to obtain such information while his application to become a police informer was pending, on March 4, 1978, at about 10:00 o'clock in the evening, O'Neal entered an abandoned building located at 150th Street and South Road, Jamaica, which he knew to be a "drug shooting gallery." O'Neal acknowledged that the narcotics detectives did not ask him to go to this particular location.

While in this premises, he saw hypodermic needles and what appeared to be a person receiving a drug injection. Several minutes after his entry, a contingent of police, including the four defendants, arrived. In the room adjoining the one

*O'Neal had admitted to using narcotics such as heroin and cocaine and having been enrolled in a drug detoxification program.

where O'Neal was located, the police recovered one or two hypodermic needles and placed O'Neal under arrest.

O'Neal claimed that he was then placed in an unmarked police care with the four defendants who then proceeded to beat him repeatedly. Defendants then brought him to the police precinct to process his arrest.*

The plaintiff also presented the testimony of New York City Detective Wayne Carrington who was involved in attempting to get Police Department approval for O'Neal to become a paid informer. Carrington testified that he asked

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*O'Neal was charged with the following crimes: burglary in the second degree (N.Y.P.L. §140.25), criminal mischief in the second degree (N.Y.P.L. 1450.00), criminally possessing a hypodermic needle (N.Y.P.L. §220.45), resisting arrest (N.Y.P.L. §205.30) and criminal impersonation (N.Y.P.L. §190.25).

O'Neal, a few days before the date of the arrest, to gather information regarding drug trafficking in New York City. Carrington further stated that, after learning of O'Neal's arrest some four or five days later, he began to make inquiry regarding the circumstances of the arrest.

The plaintiff sought to adduce testimony from Carrington pertaining to an alleged admission made to Carrington by one of the defendants to the effect that O'Neal was beaten at the time of his arrrest. Carrington testified that sometime after O'Neal's arrest he made a telephone call to defendant police officers' command, the Street Crime Unit, and asked to speak to the defendant arresting officer, Police Officer Brinton Esty, regarding the arrest. Carrington further testified that he spoke to someone who asserted that the arresting officer was unavailable and then

spoke to someone who claimed to be the arresting officer's partner. Carrington admitted that he did not know if in fact the person he spoke to was one of Esty's two partners, defendants Garbus and Morgan, and apparently had no way of ascertaining the identity of the person to whom he spoke. It was the statement made by this unidentified speaker to Carrington which plaintiff sought to admit into evidence as an admission by one of the defendants. Defendants' objected on the ground that a proper foundation had not been laid to admit into evidence as a defendant's admission a statement otherwise excludable as hearsay. The trial court sustained defendants' objections.*

*The relevant portion of Carrington's testimony and defendants' objection thereto is set forth herein at pp. 6a-7a.

After this ruling, plaintiff did not attempt to lay a foundation for the admission into evidence of the purported admission either by calling any of the defendants as part of her direct case to identify the maker of the contested statement or by the presentation of any other evidence.*

(2)

On defendants' case, all four defendants testified. Their testimony regarding the circumstances leading up to O'Neal's arrest parallelled his own testimony, but they each denied that they had assaulted him.

The defendant Garbus, one of the arresting officer's partners, testified first. On cross-examination, he was not asked if he received a phone call from Carrington. He

*All four defendants were deposed by plaintiff prior to trial.

was, however, asked if he had called Carrington and he answered in the negative. Garbus did testify that he knew that Esty, the arresting officer, had spoken to Carrington although he was unable to say when. Garbus was not asked if this conversation was the result of a phone call placed by Carrington to Esty.

The defendant Esty, the arresting officer, testified next. On cross-examination, he acknowledged that he had told Garbus that he had spoken to Carrington. When he was asked if he had spoken to Carrington on the phone, defendants made an objection. Plaintiff argued that the question was necessary to establish the required foundation for the purported admission which the trial court had refused to accept into evidence. Defendants responded by pointing out that the purported admission

offered by plaintiff was allegedly made by the arresting officer's partner, not the arresting officer. The Court sustained defendants' objection.* ** Plaintiff never asked Esty if he knew of any telephone conversation between Carrington and one of his partners.

The testimony of the defendant Morgan, one of the arresting officer's partners, then followed. He was never asked by plaintiff if he had ever had a telephone conversation with Carrington.

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*The relevant portion of Esty's testimony and defendants' objection thereto is set forth herein at pp. 12a-13a.

**Plaintiff never asked Carrington on direct examination if he had ever spoken to Esty. Carrington's response to such query, assuming that it was affirmative, would have tended to indicate that the contested phone admission was not made by Esty.

The defendant Leslie*, the supervising officer for the other defendants, was the last defendant to testify. He was not asked by plaintiff if he knew whether Garbus or Morgan had spoken to Carrington.

After the trial was completed, plaintiff's claims of assault and failure to provide adequate and proper medical care were submitted to the jury. The jury returned a unanimous verdict for defendants on both claims.

On appeal, the Second Circuit held that the District Court's evidentiary rulings excluding Carrington's testimony regarding the unidentified admission and Esty's testimony relating to a conversation with Carrington were error and ordered a new

*This defendant, William A. Leslie, is erroneously referred to in the case caption as Leslie Williams.

trial. We would respectfully submit that the District Court's rulings were correct.

Reasons For Granting The Writ

(1)

This is a case involving the Second Circuit's unjustified departure from the clear language of the Federal Rules of Evidence.

In holding that the District Court erred in excluding Carrington's testimony concerning an admission allegedly made by one of the defendants that they "beat up" O'Neal, the Court of Appeals noted that the proper use of an admission which could be attributable to one of the defendants, not further identified, in a multi-defendant civil trial had not been previously addressed by them (10a).* Our research indicates that the novelty of this

*Unless otherwise indicated numbers in parentheses refer to pages of the Petition for Writ of Certiorari.

issue is not limited to the Second Circuit and apparently has not been decided in the other circuits.

Naturally, novelty alone may not provide a sufficient basis to warrant this Court's review. However, we would submit that the conclusion reached by the Second Circuit, that an admission purportedly made by one of several defendants should be submitted for jury consideration when the speaker cannot be further identified, "leaving to each defendant the burden of persuading the jury that the admission was not made by him", is a radical and unwarranted departure from well-accepted practice and the Federal Rules of Evidence which will have a highly prejudicial impact upon all the defendants.*

*Plaintiff never argued in District Court or before the Court of Appeals that the admission would be admissible against any other defendant besides the defendant who had actually made the statement. Nevertheless, the Second Circuit, while remanding
(Footnote continued next page)

It is well settled that the admissibility of telephone conversations such as the admission offered herein is governed by the same rules of evidence which govern the admission of oral statements made in face-to-face conversation, except that the party against whom the conversation is sought to be used must be satisfactorily established. 29 AM. Jur. 2d, Evidence, §§380, 383 (1967); 79 ALR 3d 79, Admissibility of Telephone

"Footnote continued"
this case for a new trial, suggested (15a):

> Now that a retrial is ordered, however, perhaps the plaintiff will develop a record sufficient to show that the conversation is admissible against all four defendants under Rule 801(d)(2)(C) or (D), on the theory that when police officers jointly participate in law enforcement activity, they authorize each other to report their activities to fellow police officers or become each other's agents for purposes of such reporting.

Conversations, §2 (1977). This basic principle of law has not been changed or modified by the enactment of the Federal Rules of Evidence. See Federal Rules of Evidence, Rules 801(d)(2)(A), 901(a) and (b)(6).

Although the Second Circuit properly found that plaintiff had presented no evidence from which the jury could select which one of the arresting officer's partners, defendants Garbus and Morgan, had made an admission to Carrington, the Court, nonetheless, concluded that there was a sufficient basis to offer the admission to the jury and permit the jury to find that this statement was made by

one of those two defendants (9a).*

Rule 801(d)(2)(A) of the Federal Rules of Evidence provides that a statement is not hearsay when it is "offered against

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*Despite the District Court's ruling to exclude the purported admission, it should be noted that plaintiff had ample opportunity to lay a proper foundation for admission of the statement by establishing the identity of the speaker. Plaintiff had deposed all the defendants prior to trial, including Garbus and Morgan. At trial, plaintiff did not call as witnesses as part of her direct case Garbus and Morgan or any of the other defendants to try to authenticate and identify the Carrington conversation. Rule 611(c) of the Federal Rules of Evidence specifically permits a party who calls an adverse party to interrogate by the use of leading questions. Furthermore, even on cross-examination, plaintiff did not ask either Garbus or Morgan, one of whom purportedly made this admission, if they had received a phone call from Carrington.

Based on these circumstances, defendants had argued before the Second Circuit that plaintiff had effectively abandoned any attempt to establish a proper foundation for the admission so that it could properly be considered by the jury.

a party" and is "his own statement." (Emphasis added). This explicit language requires that an admission be offered against a single named party. The Second Circuit conceded that a "strict approach to the rules of evidence" might support this view and thus the proposed admission would be excluded until evidence had been presented attributing the admission to a particular defendant (10a). However, the Court decided to reject this view and made the apparently unprecedented ruling that "justice might be better served and the Rules of Evidence more reasonably construed by permitting a plaintiff to inform the jury that one of the defendants made an admission, leaving to each defendant the burden of persuading the jury that the admission was not made by him" (10a).

Not only is the Second Circuit's ruling a clear divergence from Rule 801 (d)(2)(A), we would further submit that the basis for the Court's ruling was erroneous.

The Court relied on two situations which arise in the field of tort law and which are discussed in Prosser, The Law of Torts, §§39, 41, pp. 223, 243 (4th Ed., 1971), to justify its holding (10a-11a). In one instance, where an innocent plaintiff was injured by a bullet from the gun of one of two defendants who both fired negligently at the same time and it cannot be established which defendant caused the injury, Professor Prosser endorses the view that the burden of persuasion shifts to the defendants to show that they did not cause the injury; if the jury is not persuaded by the evidence of either defendant, liability is imposed on both defendants.

In the other example, where an unconscious plaintiff undergoing an appendectomy sustained injury to his shoulder, the Court, applying the doctrine of res ipsa loquitur, permitted the jury to impose liability upon all the medical personnel involved in the operation, although it seemed quite clear that all of them could not have been responsible. See Ybarra v. Spangard, 93 Ca. 2d 43, 208 P. 2d 445 (District Court of Appeal, Second Circuit, 1949).

From these examples, the Second Circuit opined (11a):

> These examples are distinguishable from the situation in this case, but they nevertheless indicate judicial aversion in some circumstances to permitting a loss to fall upon an innocent plaintiff in circumstances where a limited group of defendants, one of whom is responsible for the injury, is in a better position than the plaintiff to pinpoint individual responsibility. (footnote omitted)

Therefore, the Court reasoned that in the instant case it was appropriate to permit the admission into evidence with the burden to fall on the two defendants Garbus and Morgan to disprove that they made the statement.

Upon close scrutiny, we believe that the analogies drawn by the Second Circuit are so markedly and significantly different from the case at bar as to render them valueless as support for the result reached below. As is readily apparent, the relief granted or urged on behalf of the tort-plaintiffs in the cited examples is truly extraordinary and is only available in only quite limited circumstances. Prosser, supra, §§39, 41, pp. 223, 243. The common denominator present in both examples to justify placing what would otherwise plainly be an impermissible and onerous burden on defendants was a

clearly aggrieved plaintiff who was in fact unable to prove the individual culpability of defendants.

These critical facts are missing from the case at bar. Plaintiff never clearly established that O'Neal actually suffered any injury while in the custody of defendants.* And plaintiff did not make

*O'Neal had testified that he was savagely beaten about the head and face repeatedly by defendants, rendering him unconscious several times and causing bleeding to his face, ear and mouth. Based on O'Neal's complaints, on the day following the arrest, O'Neal was taken by the police to Elmhurst Hospital for examination. The examination revealed nothing unusual except for a bruise to the left temple. X-rays taken of the head were negative. The police officer who escorted O'Neal to the hospital testified that there was nothing unusual about O'Neal's appearance. Carrington, plaintiff's witness, who visited O'Neal at the jail several days after the arrest, also testified that he noticed nothing unusual about O'Neal's appearance.

a sufficient showing at trial to demonstrate that she was unable to ascertain the identity of the defendant who purportedly made the admission to Carrington. See ante, p. 16, fn.

Moreover, even in Prosser, supra, there are cautions against granting such extraordinary relief to a plaintiff which are applicable to the situation at bar. Thus, in circumstances where the culpability of all defendants was not clear, it was stated (Prosser, supra, §41, pp. 243-244):

> But where there is no evidence even as to where culpability lies, the hardship may be equally great upon an innocent defendant; and except in very special cases the courts have refused to shift the burden of proof.

This observation should have equal application to the instant case where only one of the defendants was alleged to have made an admission yet the Second Circuit has

shifted the burden on at least three of the defendants, two of whom obviously did not make the statement, to disprove that they had made the admission.*

Similarly, Professor Prosser also noted that "re ipsa loquitur still has not been held to apply against multiple defendants, where it is inferable only that one has been negligent." Prosser, supra., §39, p. 224. This well-accepted practice is also contrary to the Second Circuit's ruling that the burden of proof should be placed on the three defendants regardless of the fact that the admission was only made by one defendant. Although Professor

*The Second Circuit found that defendant Esty, the arresting officer, may have made the admission based on testimony elicited from him during plaintiff's cross-examination. Defendants' objection to the admission of said testimony, sustained by District Court, is addressed later herein.

Prosser acknowledged that there are "infrequent exceptions" to this rule, such as Ybarra v. Spangard, supra, which is relied on by the Second Circuit, he asserts that the basis for that decision was the recognition that the medical personnel had a special responsibility for the plaintiff's safety. Prosser, supra., §39, pp. 223-224. The Second Circuit's decision was not based on a finding that defendants owed any special responsibility or duty to O'Neal.

Significantly, the Second Circuit did not find that all four defendants would have had knowledge of the admission allegedly made by one defendant nor was there any basis for such a conclusion. Furthermore, as the Second Circuit conceded, at best, the admission itself was not an undisputed fact, but a question to be resolved by the jury. Nevertheless, despite these unresolved factual questions, the Second

Circuit has embraced strain analogies to tort law to shift the burden of proof to each defendant to disprove that he made the alleged admission. In the Court's apparent eagerness to "smoke out" defendants, as to whom may have made the alleged admission, the Court has improvised a novel rule which is inherently unfair and prejudicial to all the defendants.

(2)

In sum, analogy to principles of tort law does not support the result reached by the Second Circuit even if it is to be concluded that the Rules of Evidence are not dispositive of the case at bar.

We are also unable to agree with the Second Circuit's belief that permitting the admission to be placed before the jury would be in the furtherance of justice. To give

the jury an admission with, as the Second Circuit found, no evidence adduced at trial to select the defendant speaker, is to provide the jury with highly prejudicial and confusing information which in reality has dubious probative value and does not aid the search for truth. Under the circumstances, for the jury to find that any of the defendants had made the admission would be tantamount to a coin toss. Sheer conjecture should play no part in the jury process.

For this reason, even assuming arguendo that submission of this admission to the jury was permitted by Rule 801 (d)(2)(A), an admission which cannot be attributed to a single defendant, we would suggest, should be properly excluded pursuant to Rule 403 of the Federal Rules of Evidence which allows the courts to exclude relevant evidence where

the probative value is far outweighed by the danger of unfair prejudice.

The District Court ruling to exclude the admission was a proper and appropriate exercise of discretion consistent with the Federal Rules of Evidence and should not have been disturbed.

(3)

The Second Circuit also found that the District Court committed a second crucial evidentiary error by refusing to permit the plaintiff to question the defendant Esty, the arresting officer, on cross-examination regarding a conversation that he had with Carrington. The purpose of this inquiry was apparently an attempt by plaintiff to establish Esty as the defendant who made an admission to Carrington although Carrington testified that he spoke to someone who identified himself as the arresting

officer's partner.* If, however, this Court agrees with our argument that the Carrington admission was properly excluded by the District Court, and thus does not provide a basis for a new trial, we would submit that the limiting of the cross-examination of Esty by the District Court was a proper exercise of judicial discretion in accordance with Rule 611(b) of the Federal Rules of Evidence and therefore this, too, does not provide a basis for a new trial.

*We feel that the Second Circuit has adopted a rather inconsistent position regarding the two contested evidentiary rulings in the instant case. On the one hand, the Court rejected defendants' argument that the Carrington testimony of an telephonic admission made by the arresting officer's partner lacked the requisite authenticity and identification to justify its admissibility. See Rule 901 (a) and (b)(6) of Federal Rules of Evidence. On the other hand, the Second Circuit found that plaintiff should be permitted to try and establish that this very same admission was made by someone other than the arresting officer's partner-namely, Esty.

Plaintiff's questions relating to a conversation between Carrington and the defendant Esty was an attempt to go beyond the direct examination of this witness. On direct examination, Esty was not asked any questions on this subject. Rule 611(b) states:

> Scope of cross-examination.-- Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on the direct examination. (Emphasis added)

It is significant to note that Congress had specifically rejected broad latitude in cross-examination. Congress amended the proposed Rule 611(b) submitted by this Court which stated that cross-examination "may" be limited to the subject matter of the direct examination by replacing the word "may" with "should." 3 Weinstein and Berger, Weinstein's

Evidence, par. §611[2]. In so amending, it was stated (Report Committee on the Judiciary, House of Representatives, 93rd Congress, 1st Session, No. 93-650, Nov. 15, 1973, p. 12):

> This traditional rule facilitates orderly presentation by each party at trial. Further, in light of existing discovery procedures, there appears to be no need to abandon the traditional rule.

Accordingly, the Courts have strictly adhered to the limitation on the subject matter of cross-examination prescribed by Rule 611(b). See Lis v. Robert Packer Hospital, 579 F. 2d 819, 823-825 (3d Cir., 1978), cert. den. ____U.S.____, 99 S. Ct. 354 (1978); United States v. Ellison, 557 F. 2d 128, 135 (7th Cir., 1977), cert. den. 434 U.S. 964 (1977); United States v. Drake, 542 F. 2d 1020, 1022 (8th Cir., 1976), cert. den. 429 U.S. 1050 (1977); United States v. Russo, 540 F. 2d 1152, 1154, n. 3 (1st Cir., 1976), cert. den. 429 U.S. 1000 (1976).

In Lis v. Robert Packer Hospital, supra., pp. 824-825, the Third Circuit expressed their strong disapproval of the trial court for its failure to comply with Rule 611(b) in the following language:

> Nevertheless although the trial court apparently failed to exercise discretion in applying Fed. R. Evid. 611(b) and Fed. R. Civ. P. 42(b), we do not reverse in this case because appellants have not persuaded us that they were visited with such prejudice as to entitle them to a new trial. Because of the dearth of case law construing Rule 611(b) in this court, we hesitate to invoke the draconian remedy of new trial simply becase the trial court followed a certain practice in all cases. For the future, however, it may be that a showing of prejudice will not be necessary to obtain relief from this court where, as here, it is demonstrated that the trial court has failed to heed the congressional command. Trial courts in this circuit can reasonably assume that in future cases this court will treat the congressional formulation as a prophylactic rule which, if not followed, requires the most severe sanction -- irrespective of demonstratably prejudicial effect. (Emphasis added)

Although Rule 611(b) does permit the court, in the exercise of its discretion to permit inquiry into additional matters on cross-examination, it is clear that this discretion should be exercised sparingly in unusual or extraordinary circumstances. See Lis v. Robert Packer Hospital, supra., pp. 823-825. The District Court's ruling to prohibit plaintiff's inquiry was correct and a proper exercise of discretion. The motivation for plaintiff's questions regarding a conversation between Carrington and defendant Esty was to revive in belated and inappropriate fashion her efforts to admit into evidence the alleged admission made to Carrington to bolster her case. Such trial conduct should be not countenanced.

As we have already pointed out, plaintiff had ample opportunity in the presentation of his case to elicit information which might

have provided a proper foundation for the admission of the statement made to Carrington. It would appear likely that if plaintiff had been permitted to question Esty along these lines the trial would have been unnecessarily prolonged without any certain benefit to plaintiff.* It is also significant that the unwavering testimony of Carrington, plaintiff's witness, was that he was told that the arresting officer was unavailable and he spoke to someone who identified himself as the arresting office's partner. It should be further noted that on direct examination

*It is not unreasonable to conclude plaintiff's change of heart in seeking to authenticate and identify the Carrington phone conversation would require plaintiff to reopen her case by calling as witnesses the other three defendants as well as the recalling of Carrington.

In effect, the Second Circuit's decision provided plaintiff with such a remedy by ordering a preliminary hearing on the issue of which defendant spoke to Carrington (15a).

plaintiff did not even ask Carrington if he had ever spoken to the arresting officer Esty. Thus, the connection that plaintiff drew between an admission made to Carrington and a conversation with Esty is most suspect.

Based on all the surrounding circumstances, the District Court acted properly in refusing to permit plaintiff to pursue questioning which, in effect, would have allowed her to reopen her case, particularly where the significance of the line of inquiry was highly questionable.

Conclusion

THE QUESTIONS PRESENTED ARE OF SUFFICIENT MAGNITUDE TO WARRANT REVIEW BY THIS COURT.

Respectfully submitted,

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OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 145—September Term, 1980

(Argued September 30, 1980

Decided December 23, 1980)

Docket No. 80-7286

AURORA O'NEAL as Administratrix of Estate
of TYRONE O'NEAL, deceased,

Plaintiff-Appellant,

—v.—

BRINTON ESTY, DETECTIVE EDWARD MORGAN,
ROBERT GARBUS and SERGEANT LESLIE WILLIAMS,

Defendants-Appellees.

Before:

OAKES and NEWMAN, *Circuit Judges,*
and COFFRIN,* *District Judge.*

* Hon. Albert W. Coffrin of the United States District Court for the District of Vermont, sitting by designation.

OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

Appeal from a judgment for the defendants entered after a jury verdict in the District Court for the Eastern District of New York (Mark Costantino, Judge) in an action for damages for false arrest and police brutality brought pursuant to 42 U.S.C. § 1983 (1976), the appellant challenging the exclusion from evidence of an admission allegedly made by one of the defendants that they "beat up" the appellant's decedent.

Judgment reversed and new trial ordered.

GERALD MURRAY, Jamaica, N.Y., *for plaintiff-appellant.*

LARRY A. SONNENSHEIN, New York, N.Y. (Allen G. Schwartz, Corporation Counsel of the City of New York, and Angelo Aiosa, New York, N.Y., on the brief), *for defendants-appellees.*

NEWMAN, *Circuit Judge*:

This is an appeal from a judgment for the defendants-appellees entered after a jury verdict in the District Court for the Eastern District of New York (Mark Costantino, Judge) in an action for damages brought pursuant to 42 U.S.C. § 1983 (1976). The plaintiff-appellant's complaint alleged that the defendants, New York City police officers, violated the civil rights of her deceased husband,[1]

[1] The plaintiff's husband died before trial due to causes unrelated to the alleged conduct of the defendants.

Tyrone O'Neal, by falsely arresting him, beating him, and failing to provide him with prompt and adequate medical care. The principal issue on appeal is whether the District Court erred in excluding testimony concerning an admission allegedly made by one of the defendants that they "beat up" O'Neal. Concluding that this exclusion of evidence going to the heart of the case was error, we reverse and remand for a new trial.

Facts

The bulk of the plaintiff's direct case consisted of two pretrial depositions of her husband. He testified that prior to the events giving rise to the complaint he had assisted several officers of the Narcotics Division of the New York City Police Department in an investigation of narcotics trafficking in Jamaica, Queens and that he had applied to become a paid informer. On March 4, 1978, the date of the events in question, at approximately 10:00 p.m., he entered a vacant building in Jamaica, which he knew to be a "drug shooting gallery," in an effort to obtain information. After being admitted to the second floor, he saw two hypodermic needles abandoned on the floor and a person who appeared to be receiving a drug injection from the operator of the "shooting gallery." Moments later, a contingent of police officers arrived, causing the other people at the scene to flee the premises. O'Neal testified that the officers seized the hypodermic needles and arrested and handcuffed him in a nearby room. He stated that he was then placed in an unmarked car with the four appellees. He recalled that Officer Esty, the arresting officer, sat to his right in the rear seat of the vehicle; that Sergeant Williams sat to his left; that Detective Morgan, Esty's partner, occupied the passenger side

of the front seat while Officer Garbus, their other partner, drove. He claimed that he advised the officers that he was doing undercover work and that, if allowed to make a telephone call, he could clear up the misunderstanding. He testified that Esty reacted by punching him in the face with his fist and that Williams then struck him in the face repeatedly with a hand-held police radio. He stated that he tried to avoid further blows by ducking his head between his knees but that Morgan and Garbus were able to raise him by the collar and deliver additional blows from their positions in the front seat. The beating continued in flurries, he claimed, until he lost consciousness, bleeding from his mouth, the left side of his face, and his left ear. At the precinct house, he was booked on charges of burglary in the second degree, unlawful possession of a hypodermic needle, resisting arrest, and criminal impersonation.

The plaintiff also offered the testimony of New York City Detective Wayne Carrington, who had worked with O'Neal prior to the incident. Carrington testified that he had asked O'Neal to gather information concerning drug trafficking in the City. He also stated that, at the time of the arrest, he was processing O'Neal's application to become a paid informer.

The defense consisted of the testimony of the four defendants. Their version of the events inside the building agreed with the version given by O'Neal. They stated that after they got in the car, O'Neal told them "I'm just like you," but that his answers to questions posed in "police jargon" convinced them he was not a police informer. All denied using excessive force to effect the arrest or at any time during the drive to the precinct house.

At the close of the plaintiff's case, the District Court granted the defendants' motion for a directed verdict on

the claim of false arrest,[2] and submitted the remaining claims to the jury, which returned a defendants' verdict.

The Exclusion of Evidence

The plaintiff unsuccessfully attempted on two occasions to elicit testimony concerning an admission allegedly made by one of the defendants during a telephone conversation with Detective Carrington. The plaintiff offered to prove that the officer with whom Carrington had spoken had admitted that the group of officers at the arrest scene "beat up" O'Neal.

1. The plaintiff first attempted to elicit testimony concerning the admission during the direct examination of Detective Carrington. Carrington testified that when he learned of O'Neal's arrest, he visited O'Neal in the detention center and was told by O'Neal that the defendants had beaten him after placing him under arrest. Carrington stated that he then contacted the Assistant District Attorney handling the case to ask if he could check the records "to see exactly what the officers said compared to what Mr. O'Neal [said]." The plaintiff did not pursue this line of inquiry. Instead, the examination,

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[2] The plaintiff's challenge to this ruling is without merit. The undisputed facts established probable cause to arrest O'Neal. The arresting officers found him on the second floor of an abandoned building, known to be a narcotics distribution point. Suspects were fleeing to the roof of the building, and O'Neal was found near abandoned hypodermic needles. The plaintiff challenges the arrest because the officers made no serious effort to determine the truth of O'Neal's claim that he was on the premises to gather information for the police. However, a police informer does not enjoy immunity from an arrest that is supported by probable cause. The officers had no idea O'Neal might be an informer until after the arrest. They incurred no liability by deferring ascertainment of his claim until the arrest process had been completed.

set out in the margin,[1] sought to establish the identity of the person who had spoken to Carrington and the content

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[1] Q. Now, after you spoke to the Assistant District Attorney, what did you do if anything next in regard to the case?

A. I attempted to contact the arresting officer.

Q. And how did you do that?

A. I called Mr. Meel.

Q. What happened when you made that phone call? What command are you talking about?

A. I believe it was the Street Crime Unit.

Q. When you called the Street Crime Unit, what happened?

A. I asked for the arresting officer, and he wasn't available, and whoever answered the phone said they'd put me in contact with his partner and I spoke to—

Defendants' Counsel: Objection.

A. Did you seek [sic] his partner?

A. I—

Court: Sustained.

Q. Did you seek [sic] his partner?

Court: Yes, or no. That is all.

Defendants' Counsel: Objection.

Court: Just yes or no whether he spoke to him or not.

Q. Did you speak to his partner? Would you please answer that yes or no?

Defendants' Counsel: Objection.

Court: I didn't hear that last part.

Plaintiff's Counsel: He objected to what you said. I answered I asked if he spoke to his partner, yes or no.

Court: He may answer it only yes or no. Period. Nothing else.

A. I don't know.

Q. Well did somebody take the phone call—the person—when they said they were going to put you in touch with his partner, did they transfer you to another officer?

A. Another officer got on the phone.

Q. Did that officer tell you he was his partner?

A. Yes, he did.

(footnote continued on following page)

of the conversation. The plaintiff elicited testimony that Carrington had spoken by telephone to a person who

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Q. And did you ask that officer if he was present on the night of the arrest of Tyrone O'Neal at the scene?

A. Yes, I did.

Q. What did he say?

Defendants' Counsel: Objection. May we approach the bench?

(Whereupon, the following discussion was held at the side bar)

Defendants' Counsel: Your honor, we contend that any of this—

Court: None of this is relevant.

Plaintiff's Counsel: Your honor, can I say one thing? I can't say it?

Court: The only issue in this case is whether the policemen were there, had probable cause or reasonable cause to make the arrest and believed that a crime had been committed. That is it. That is where we are at, not what he thinks or what he said or what somebody told him.

Plaintiff's Counsel: Can I say one thing, your honor? He stated his officer told him he was the partner of the arresting officer, and he was present at the arrest which makes him one of the defendants in this case.

Court: No it doesn't.

Defendants' Counsel: No foundation.

Court: It does not help.

Plaintiff's Counsel: That was my point. Then there is an admission. I am going to ask him about that. That was my point.

Court: Is he a defendant in this case?

Plaintiff's Counsel: I beg your pardon?

Court: Is he a defendant in this case?

Plaintiff's Counsel: I beg your pardon?

Court: Is he a defendant in this case?

Defendants' Counsel: Who?

Plaintiff's Counsel: Yes, that is my contention.

Defendants' Counsel: There has been no foundation for the question.

Court: Yes.

Plaintiff's Counsel: Respectfully except.

Court: Okay.

identified himself as one of the partners of the arresting officer. Objection to the content of that conversation was sustained.

The defendants contend that the District Court's exclusion of the conversation was proper because the plaintiff failed to satisfy the authentication or identification requirement of Rule 901(a) of the Federal Rules of Evidence. Rule 901(a) provides that "the requirement of authentication or identification is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Advisory Committee Note to the Rule explains that "authentication and identification represent a special aspect of relevancy [citation omitted]. Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved." The Advisory Committee Note further explains that "this requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b)."[4]

The allegation of fact on which the relevancy of the admission depended in this case was that the person who made the admission to Carrington was one of the defendants. If this allegation was supported by sufficient evidence, the admission was clearly relevant to the claim of police brutality. Carrington could not identify the voice of the person with whom he spoke as that of one of the defendants, but voice recognition is not required. Under

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[4] Rule 104(b) provides:

Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition of fact.

Rule 901(a)(6), circumstantial evidence, including self-identification, may be sufficient to identify the person who answers a telephone call. In this Circuit, self-identification of the person called at a place where he reasonably could be expected to be has long been regarded as sufficient. See *United States v. Markis*, 352 F.2d 860, 864 (2d Cir. 1965); *Van Riper v. United States*, 13 F.2d 961, 968 (2d Cir.), *cert. denied sub nom. Ackerson v. United States*, 273 U.S. 702 (1926). Carrington's testimony showed that he called the arresting officer at the Street Crime Unit, the place where all the defendants could be expected to be; that the call was referred to one of the arresting officer's partners; and that the person to whom the call was referred identified himself as the arresting officer's partner. These circumstances were sufficient to support a finding that the person who made the admission was one of the arresting officer's partners, Garbus or Morgan. See *United States v. Fassoulis*, 445 F.2d 13, 17 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971); *United States v. LoBue*, 180 F. Supp. 955, 956 (S.D.N.Y. 1960), *aff'd sub nom. United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962).

The defendants contend that even if the plaintiff succeeded in showing that the admission was made by either Garbus or Morgan, exclusion of the admission was proper because Rule 901(a) required the plaintiff to identify which of these two defendants made the admission. Although the defendants ground their argument on Rule 901(a), they could perhaps more plausibly base it on Rule 801(d)(2), which provides that a statement is not hearsay if it is "offered against *a* party" and is "*his* own statement." (Emphasis added). Here the plaintiff presented a sufficient basis for the jury to find that the admission was made by either Garbus or Morgan, but no evidence from which the jury could select between the two.

The proper handling of an admission that could reasonably be found to have been made by one of the defendants, not further identified, in a multi-defendant civil trial poses an issue of some uncertainty, which appears not to have been previously considered, at least by this Circuit. A strict approach to the rules of evidence might suggest that an admission is not relevant and hence cannot come into evidence until the trial judge, acting under Rule 104(b), has determined that there is at least sufficient evidence (adduced or to be presented) for the jury reasonably to find that it was made by the particular defendant against whom it is offered. On the other hand, justice might be better served and the Rules of Evidence more reasonably construed by permitting a plaintiff to inform the jury that one of the defendants made an admission, leaving to each defendant the burden of persuading the jury that the admission was not made by him.

Support for the latter approach may be drawn by analogy to the way some courts have handled somewhat similar problems in the field of tort law. One situation arises when the plaintiff presents evidence to show that two persons acted negligently toward him, but is unable to determine which of the two caused the injury he sustained. Professor Prosser offers the example of w defendants negligently firing weapons in a public area, with the bullet from one striking the plaintiff. If from ballistics or other evidence the plaintiff cannot determine which defendant caused his injury, Professor Prosser endorses the view that the burden of persuasion shifts to the defendants to prove that they did not cause the injury: if the jury is not persuaded by the evidence of either defendant. liability is imposed upon both defendants. See Prosser, *The Law of Torts* 243 and nn. 54-57 (4th ed. 1971) (collecting cases). Another situation occurs when a

plaintiff cannot even ascertain which defendant was negligent, but offers evidence that at least one of a group of defendants negligently caused him injury. In *Ybarra v. Spangard*, 93 Cal. App. 2d 43, 208 P.2d 445 (1949), an unconscious plaintiff undergoing an appendectomy sustained injury to his shoulder. The Court, using principles of *res ipsa loquitur*, permitted the jury to impose liability upon all the medical personnel involved in the operation, though it was unlikely that each was at fault. In effect, each defendant was assigned the burden of proof on the issues of both negligence and causation.

These examples are distinguishable from the situation in this case,[5] but they nevertheless indicate judicial aversion in some circumstances to permitting a loss to fall upon an innocent plaintiff in circumstances where a limited group of defendants, one of whom is responsible for the injury, is in a better position than the plaintiff to pinpoint individual responsibility. We find the analogies sufficiently helpful to rely upon them at least for the limited purpose of developing a procedure for placing an admission in evidence in a multi-defendant civil trial. We conclude that when a plaintiff presents to the trial judge sufficient evidence from which a jury can reasonably find that an admission was made by one of a limited group of two or more of the defendants, the admission should be received in evidence and the jury should be instructed that

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[5] In the shooting example, both defendants were shown to have acted negligently; the burden of proof was shifted only on the issue of causation. The operation case is an even further departure from the traditional rule requiring a plaintiff to prove individual responsibility, but it involves a special responsibility for the plaintiff's safety assumed by all of the medical personnel in attendance. The case was subsequently explained and limited on this basis. *Gobin v. Avenue Food Mart*, 178 Cal. App. 2d 345, 2 Cal. Rptr. 822 (1960). *See generally* Prosser, *supra* at 223.

it may consider the admission against each member of that group of defendants who fails to persuade the jury that he did not make the statement. In this case, since the plaintiff's evidence was sufficient to permit the jury to find that the admission was made by either Garbus or Morgan, the admission should have been received in evidence in the cases of these two defendants, with the burden of proof on each of them to disprove that he made the statement. Of course, if both denied making the statement, the jury should them have been told that if it was persuaded by their denials and by any other evidence tending to show that neither made the admission, the jury should not consider the statement against either of them. At this point in the trial, the statement would not have been admissible against either of the other two appellees, Esty and Williams.

2. The plaintiff's second attempt to elicit testimony concerning the admission occurred during her cross-examination of the arresting officer, defendant Esty. The questioning, set out in the margin,[6] sought to pursue

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[6]

Q. By the way, were you present when Officer Garbus testified in the courtroom?

A. Yes, I was.

Q. Do you recall him testifying that he heard you talking on the telephone to Detective Carrington? Do you recall that?

A. To the best of my recollection, I don't think he testified that he heard me talking on the telephone.

Q. Well, you remember him testifying about that?

A. To the best of my recollection I heard him say that I notified him—I advised him that I talked to one Detective Carrington.

Q. That you advised him then. I see. Well, did you talk to Detective Carrington, yes or no, on the phone?

Defendants' Counsel: I would like to object at this time. Can I approach the bench?

(footnote continued on following page)

testimony by defendant Garbus that Esty had told Garbus that it was Esty who had spoken to Carrington. When Esty was asked whether he had talked to Carrington, objection was made and sustained. The objection was

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Court: No, I will sustain it.

Q. Did you receive a telephone call from or did you call Detective Carrington to discuss this arrest?

Defendants' Counsel: Your honor, I would like to reiterate my objection to this line of questioning. Can we approach the bench or is counsel going to continue to—

Plaintiff's Counsel: Certainly.

(At the side bar)

Defendants' Counsel: Your honor, this line of questioning is irrelevant. It goes to the issue of whether there was a false arrest, or he should have tried to make a contact with a contact, and it is not relevant to any germane issue in this case.

Court: False arrest is out.

Plaintiff's Counsel: Well, he said that, I didn't say that.

Court: I said it's out.

Defendants' Counsel: He mentioned—

Court: That is the only reason for it. That is the only reason for the question.

Plaintiff's Counsel: The reason for the question, if I may—the reason for the question is he asked Detective Carrington—I am talking of an admission. I am [not] talking to false arrest. I am talking about the assault on this individual. Our allegation is he made an admission to Detective Carrington as to what happened that evening. As far as the assault, it is still in the case.

Court: What was the admission?

Plaintiff's Counsel: I never got it into evidence because I was stopped, but the admission is he told them that they beat him up.

Defendants' Counsel: That is not what Detective Carrington said. That is not what Detective Carrington said so far as he testified. He said he talked to the arresting officer's partner. That is—

Court: That is all he—

Plaintiff's Counsel: That is what he was told on the phone, but apparently that was not—

Court: I will sustain the objection. I will take my chances with it.

initially made on the ground that the answer would be relevant only to the false arrest claim, which had been dismissed at the close of the plaintiff's case. When plaintiff's counsel argued that the conversation contained the admission of a beating and was relevant to the excessive force claim, defendants' counsel further objected on the ground that Carrington had testified that he had spoken to one of the arresting officer's *partners*, implying that he had not spoken to Esty, who was the arresting *officer*.

This objection was not well taken. Even though some of Carrington's testimony indicated that he had spoken to one of the partners of the arresting officer, the plaintiff was not bound by this version and was entitled to ask Esty if he was the one who had spoken to Carrington. If Esty had acknowledged speaking to Carrington, then, even if Esty denied making the admission, Carrington could have been recalled to testify to the content of the conversation, leaving for the jury the credibility issue as to whose version of the conversation was truthful.* Moreover, if Esty had denied even speaking to Carrington, Carrington's version of the conversation would nonetheless have been admissible against him, because Garbus's testimony provided the jury with a reasonable basis to find that Esty was the person who had spoken to Carrington. Like Garbus and Morgan, Esty would then have had the burden of proof to persuade the jury that he had not spoken to Carrington, since the evidence would then

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* If Esty acknowledged being the officer who spoke to Carrington, then it would have been appropriate to instruct the jury that the conversation was to be considered only against Esty and was to be withdrawn from the cases involving Garbus and Morgan, since evidence at that point in the trial would have precluded a jury from reasonably finding that either Garbus or Morgan had spoken to Carrington.

have continued the uncertainty as to which of these three defendants had made the admission.

Since in each of the two instances described the District Court erred in excluding testimony concerning an admission crucial to the plaintiff's brutality claim, the judgment is reversed and a new trial is ordered.*

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* The writer would prefer to limit the remedy at this point to a remand for a preliminary hearing before the District Court under Rule 104(a) on the issue of which one of the appellees spoke to Carrington. *Cf. Shotwell Mfg. Co. v. United States*, 355 U.S. 233 (1957). Rule 104(a) provides:

> *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

A hearing under Rule 104(b) might well eliminate all question as to whether it was Esty, or Garbus, or Morgan who spoke to Carrington, for example, if Esty were to acknowledge the conversation (even though disputing its content). If the identity of the declarant became clear, a new trial would be appropriate only as to him. Even if, after a hearing, a jury question remained as to whether Carrington spoke to Esty, Garbus, or Morgan, a new trial would not be warranted as to Williams, as to whom plaintiff has made no showing to justify admission of the conversation. A defendant should not lose a judgment in his favor and be obliged to face retrial if evidence improperly excluded cannot in any event be considered against him.

Now that a retrial is ordered, however, perhaps the plaintiff will develop a record sufficient to show that the conversation is admissible against all four defendants under Rule 801(d)(2)(C) or (D), on the theory that when police officers jointly participate in law enforcement activity, they authorize each other to report their activities to fellow police officers or become each other's agents for purposes of such reporting.

JUDGMENT OF THE UNTED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Filed March 12, 1980

This action came for trial before the Court, Honorable Mark A. Costantino, United States District Judge presiding and the issues having been duly tried and heard and a decision having been duly rendered,

It is Ordered and Adjudged

that a directed verdict is entered on behalf of the defendants and against the plaintiff on the plaintiff's claim for false arrest, and that plaintiff take nothing of the defendants on said claim; AND FURTHER, that judgment is entered on behalf of the City of New York and against the plaintiff on all claims asserted by the plaintiff in this action, and that

plaintiff taking nothing of the City of New York in this action;

AND FURTHER, that the claim of false arrest is dismissed as to all parties, and that the complaint is dismissed as to defendant City of New York in all respects.

Dated: Brooklyn, New York
March 11, 1980

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Filed March 12, 1980

TYRONE O'NEAL,

Plaintiff,

-against-

CITY OF NEW YORK, BRINTON ESTY, SGT. WILLIAM LESLIE, DETECTIVE EDWARD MORGAN, and ROBERT GARBUS,

Defendants.

This action came on for trial before the Court and a jury, Honorable Mark A. Costantino United States District Judge, presiding and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged

that judgment is entered on behalf of the defendants and against the plaintiff on the plaintiff's claims for beating and failure to provide medical care, and that plaintiff take nothing of the defendants,

AND FURTHER,

that the complaint is dismissed.

Dated: Brooklyn, N.Y.
March 11, 1981